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NTSB Order No. EA-5176

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of September, 2005

Petition of

GUNNAR PETERSON SEAQUIST,

for review of the denial by the
Administrator of the Federal
Aviation Administration of the
issuance of an airman medical
certificate.

Docket SM-4625

OPINION AND ORDER

The Administrator has appealed from the March 1, 2005, oral initial decision and order of Administrative Law Judge William R. Mullins,¹ which reversed the Administrator's denial of petitioner's February 19, 2004, application for a third-class medical certificate. The August 13, 2004, denial was based on the Federal Air Surgeon's determination that petitioner had "a history of substance dependence (alcohol)," which is a

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

disqualifying condition under 14 C.F.R. 67.307(a)(4).² The Federal Air Surgeon's denial letter further stated that he would be willing to reconsider petitioner's eligibility after 2 years of total abstinence from the use of alcohol, if petitioner provided documentation of his enrollment in and completion of a formal substance abuse program; attendance in an aftercare program with emphasis on relapse prevention; and demonstration of his commitment to sobriety.

Background

Petitioner acknowledges that he has been involved in three motor vehicle actions related to driving while under the influence of alcohol. The first event, which occurred on July 5,

² Section 67.307(a)(4) sets forth the following standard for third-class medical certification:

(a) (a) No established medical history or clinical diagnosis of ...

* * * * *

(4) Substance dependence, except where there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from the substance(s) for not less than the preceding 2 years. As used in this section --

* * * * *

(ii) "Substance dependence" means a condition in which a person is dependent on a substance ..., as evidenced by -

- (A) Increased tolerance;
- (B) Manifestation of withdrawal symptoms;
- (C) Impaired control of use; or
- (D) Continued use despite damage to physical health or impairment of social, personal, or occupational functioning; ...

1997, when petitioner was 17 years old, resulted in his being convicted of driving while intoxicated and receiving 6 months' unsupervised probation. The second event occurred on February 8, 2000, and resulted in a conviction for driving under the influence (DUI), a 180-day suspension of his driver's license, and 6 months' unsupervised probation. As a result of this event, petitioner was also ordered to participate in alcohol counseling sessions and a victim impact panel. The third event, which occurred on February 4, 2002, resulted in petitioner being arrested for DUI and jailed after leaving the scene of an accident. The DUI charge was dismissed on a technicality (the arresting officer was outside his jurisdiction), but petitioner's driver's license was suspended for 6 months. The record does not indicate petitioner's blood alcohol level in any of the three events. However, petitioner does not dispute that he was intoxicated on all three occasions and refers to each of the events as a DUI.

At the hearing, petitioner testified that after his third DUI, he realized that "people's lives were at risk," and he changed his drinking habits. He stated he abstained from alcohol completely for 4 to 5 months after the February 2002 DUI event, and since then has only consumed alcohol occasionally. He explained that on those occasions he drinks, "rarely more than one drink, if it is, it is two at the max," and the occasions on which he drinks are "months apart." (Transcript (Tr.) 73.) He testified that he had not consumed any alcohol since December 31,

2004 (i.e., approximately 2 months prior to the hearing).

Petitioner also stated that he never experienced withdrawal symptoms and never experienced any personal, social, or occupational impairment.³ He stated that he can control his alcohol use and does not believe he is substance dependent.

Petitioner also introduced records from a court-ordered alcohol educational and counseling program that he successfully completed in June 2003.⁴ The counseling records indicate that petitioner started drinking alcohol at age 14. As part of the program he filled out a substance-abuse screening inventory. (Exhibit P-2.) The results of the inventory, based on petitioner's self-reported information, indicated: "low probability of substance dependence with moderately elevated scores, consider further evaluation." The report further stated that petitioner's profile

does not contain sufficient evidence to warrant classifying the client as substance dependent. However, the client is acknowledging a pattern of current or past problematic usage, and the subtle scale scores are somewhat elevated, suggesting the possibility of substance misuse, a developing problem, or an undetected substance use disorder. Consideration should be given to providing substance abuse education, values clarification, and ongoing assessment.

³ Petitioner noted that he is currently a law student and engaged to be married, has held several jobs in the past, and has always done well in school. He acknowledged that he has had some difficulties with the legal system, but stated that he did not consider this to be an impairment. (Tr. 76-7.) He also acknowledged that he had arguments with his family about the legal problems resulting from his DUIs, but he denied that these arguments focused on his alcohol use per se. (Tr. 90.)

⁴ Petitioner testified that his primary reason for attending the counseling sessions was to fulfill his court-ordered obligation. He attended from April 4, 2003, to June 11, 2003.

(Exhibit P-3.)

Petitioner also introduced testimony from Dr. Ned Beiser, an aviation medical examiner who petitioner consulted in December 2004 after he received the Federal Air Surgeon's denial letter. Dr. Beiser testified that he and petitioner discussed petitioner's DUIs and history of alcohol use, and he reviewed the court-ordered alcohol counseling records. Dr. Beiser stated that petitioner, "admitted that he had a drinking problem" (Tr. 40), but petitioner said that when he graduated from college in May 2002, he decided that he would "stop drinking to excess" (see Exhibit P-1, p. 4). When asked whether he thought petitioner was dependent on alcohol, Dr. Beiser stated, "it is hard for me to say at this time with this information because he is still drinking up to, periodically drinking,⁵ but, if he just drinks one drink periodically, he is probably not ... addictive at this time." However, Dr. Beiser also admitted under cross-examination that the circumstances of the three DUI events could suggest alcohol dependence (Tr. 52), and he stated that the FAA's denial on the basis of substance dependence was within the bounds of reason (Tr. 64).

The Administrator introduced testimony from FAA's chief psychiatrist, Charles Chesanow. In a memo dated July 19, 2004, he wrote, "I believe a thorough substance abuse/dependency

⁵ Petitioner reported to Dr. Beiser that he had quit drinking, but still had an "occasional beer or glass of wine." (Exhibit P-1, pp. 1, 4.)

evaluation is indicated. Since this has been refused, I advocate denial based on failure to provide requested information.

Alternatively, he could recognize that he does have alcoholism and enter an acceptable treatment program." (Exhibit P-4.) Dr. Chesanow explained in his testimony at the hearing that he wanted to see if there were extenuating circumstances and he wanted to give petitioner the benefit of the doubt. However, he said that when he wrote the memo he did in fact believe that petitioner had a drinking problem, but wanted to see if there was evidence to dispute or corroborate this belief. (Tr. 169-70.)

Dr. Chesanow further testified that, in his opinion, petitioner has a medical history of substance dependence and that petitioner has areas of impairment that are characteristic of dependence. For example, he stated that a non-dependent person would have adjusted their behavior after their first DUI event. He testified that when a person has multiple DUIs, like petitioner, it indicates that they are unable or unwilling to comply with social expectations. He stated that DUIs are usually "only the tip of the iceberg," in that a person who is caught driving while intoxicated has likely done so on many prior occasions and not been caught. (Tr. 173.) He also stated, "with each subsequent DUI, it appears that the behavior has become more egregious [with] the third resulting in an accident." (Tr. 149.) Dr. Chesanow also noted that petitioner had admitted consuming 8-10 drinks prior to the third DUI incident, suggesting a high tolerance level. He further noted that early onset of drinking

is associated with later alcohol dependence (as earlier mentioned, petitioner began drinking at age 14). Finally, Dr. Chesanow stated that he disagreed with the inventory test results from petitioner's court-ordered alcohol counseling, which stated that petitioner had a low probability of substance dependence.

The Administrator also introduced testimony from Kathleen McFadden, a Ph.D. in business, who testified about several studies she has conducted that evaluated the links between DUI convictions and pilot performance. One study showed that general aviation pilots who have DUI convictions are 3.5 times more likely than pilots without convictions to have alcohol-related aviation accidents. (Exhibit A-5; Tr. 113-4.)

In his oral initial decision, the law judge concluded, on the basis of "the totality of the evidence" including petitioner's testimony and his "change in lifestyle," that petitioner had established that he was not alcohol dependent, and that the Federal Air Surgeon's denial on that basis was not justified. The law judge concluded that Dr. McFadden's testimony was not relevant to the medical issues in this case. He stated that the FAA's position appeared to be that three DUIs equals alcohol dependence. (Tr. 197.) However, in the law judge's estimation, the most critical piece of evidence was the July 19, 2004, memo from Dr. Chesanow, in that his recommendation was to deny petitioner's application based merely on the failure to provide information, and not on an articulated conclusion that petitioner was alcohol dependent.

On appeal, the Administrator argues that the law judge misinterpreted Dr. Chesanow's memo, and failed to address the fact that Dr. Chesanow also testified that in his opinion petitioner had a history of substance dependence and was, therefore, disqualified under section 67.307(a)(4). The Administrator argues that the record shows petitioner has an established medical history of alcohol dependence. Specifically, she argues that petitioner exhibited impaired social and personal functioning (for example, causing endangerment by his erratic driving in the 2000 and 2002 DUI events; his belligerent behavior and lack of cooperation documented in police records of the 2000 DUI; his leaving the scene of an accident in connection with the 2002 DUI event; and engaging in arguments with his family over the repercussions of the DUIs). The Administrator also argues that Dr. McFadden's testimony is relevant to this case because it underscores how attitudes regarding DUIs and their impact on aviation safety have changed over the years, and shows that there are aviation-related safety risks associated with multiple DUIs. Finally, the Administrator points out that petitioner has not met the requirement, for those with a history of substance dependence, of 2 years of total abstinence in order to be eligible for certification.

In his reply brief, petitioner asserts that none of the factors listed in section 67.307(a)(4) as indicating substance dependence (increased tolerance; withdrawal; impaired control of use; or damage to health, social, personal, or occupational

functioning) have been shown in this case. He also argues that because the Administrator declined to take the legal position that three DUIs equals alcohol dependence,⁶ she forfeited any claim that the Board must defer to FAA's interpretation of a regulation. The Board is bound by the FAA's reasonable interpretation of its regulations, but not by its findings of fact. 49 U.S.C. 44709(d)(3); Garvey v. NTSB, 190 F.3rd 571 (D.C. Cir. 1999).

Discussion

In our judgment, petitioner's FAA medical file contains sufficient information to justify a finding of a history of alcohol dependence.⁷ Specifically, his file contains indicia of impaired control of use and continued use despite impaired personal or social functioning. Petitioner admits that at one

⁶ In closing argument, counsel for the Administrator requested, "deference to our position that ... the facts in this case constitute substance dependence." When the law judge asked whether the Administrator was taking the position "that three DUIs equal alcohol dependence," counsel responded, "[w]ell, I don't want to make a big deal about that, because ... even aside from the deference issue ... [petitioner] has not met his burden of proof ... [so] that in and of itself supports our determination that the denial was appropriate and should be affirmed." (Tr. 186-7.) As noted above, the Board owes deference only to the Administrator's regulatory interpretations, not to her factual findings.

⁷ While Dr. McFadden's testimony fortified the safety benefit of regulating substance dependence by showing the overrepresentation of pilots who had previous DUI convictions in alcohol-related aviation accidents, we do not rely on her testimony because our focus is not on the efficacy of the rule but rather whether respondent in fact has a history of alcohol dependence. In this connection, we also note that the Federal Air Surgeon apparently did not rely on Dr. McFadden's research in reaching his August 13, 2004, determination as the research was not introduced into the record until just prior to the hearing.

time he had a drinking problem and that he realized after his third DUI that his drinking was putting people's lives "at risk." As Dr. Chesanow pointed out, a person who is not dependent on alcohol would have been able to control their intake of alcohol after the first DUI, thereby avoiding subsequent DUIs. However, petitioner was obviously unable to control his use of alcohol so as to avoid putting himself and others in life-threatening situations involving drinking and driving. Although we have previously said that one DUI does not constitute proof of social dysfunction,⁸ the Federal Air Surgeon could reasonably conclude that three DUIs within 5 years are a strong indication of impaired social functioning and impaired control of use and, thus, of alcohol dependence. Petitioner did not present any medical information to counter this. Nor has he met the 2-year total abstinence requirement for applicants with a history of substance dependence.

The only medical testimony petitioner presented was from Dr. Beiser, whose is not an expert in alcohol abuse or dependence. Furthermore, Dr. Beiser's testimony was equivocal on the issue of whether he believed the available information was consistent with a history of substance dependence. The results of petitioner's substance abuse screening inventory (Exhibit P-2) do not constitute medical evidence. Moreover, the results were

⁸ Petition of Bates, NTSB Order No. EA-4195 (1994), at 4 (Federal Air Surgeon's denial based on finding of alcoholism reversed based on finding that no evidence indicated alcohol had affected petitioner's social or personal functioning).

inconclusive,⁹ and do not overcome the other evidence discussed above indicating substance dependence.¹⁰ Petitioner did not present expert medical opinion testimony or, more to the point, a substance abuse/dependency evaluation, as recommended by Dr. Chesanow. In light of petitioner's apparent refusal of the FAA's request for such an evaluation, it is possible that the Federal Air Surgeon could have issued a final denial on this basis.¹¹

In any event, it is clearly within the Federal Air Surgeon's discretion to deny an application on any supportable basis,¹² even if another basis exists that might also be valid. We hold that the Administrator had a sufficient basis for denying the application under 67.307(a)(4), and petitioner has failed in his burden of proving that he does not have a history of alcohol dependence.

⁹ Although the inventory results indicated a "low probability of substance dependence," the report also stated that petitioner had acknowledged, "a pattern of current or past problematic usage ... suggesting the possibility of substance misuse, a developing problem, or an undetected substance use disorder."

¹⁰ We also note that this screening inventory was already part of petitioner's medical file and was therefore presumably considered by the Federal Air Surgeon.

¹¹ Title 14 C.F.R. 67.413(a) authorizes the Administrator to deny an application for a medical certificate if the applicant fails to provide requested medical information or history that the Administrator finds is necessary to determine whether the applicant meets the medical standards.

¹² An internal memorandum in petitioner's official FAA medical record indicates that petitioner's case "was discussed at length" during an August 5, 2004 teleconference, "and a decision was made to final deny for substance dependence." The memo further explained, "we feel we can defend FAR criteria for substance dependence before the board but could use any additional supporting information." (Exhibit A-1, p. 12.)

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted and the law judge's decision is reversed;
2. The denial of petitioner's application for third-class medical certification is affirmed; and
3. Petitioner's motion for oral argument is denied.¹³

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HERSMAN, Members of the Board, concurred in the above opinion and order.

¹³ The issues have been fully briefed by the parties and oral argument is not necessary. See 49 CFR 821.48.